BOTETOURT
COUNTY OF VIRGINIA

Office of the Administrator

1 West Main Street
Fincastle, Virginia 24090

September 19, 2018

VIA ELECTRONIC FILING
Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, District of Columbia 20554

RE: Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, WC Docket No. 17-84; Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, WT Docket No. 17-79

Dear Ms. Dortch,

I am writing as the Botetourt County Administrator to express our concerns over the Federal Communications Commission's proposed Declaratory Ruling and Third Report and Order regarding state and local governance of small cell wireless infrastructure deployment. Botetourt County, Virginia, is a county roughly 550 square miles in area and has a population of roughly 34,000. It is in the Blue Ridge region, just north of the City of Roanoke. It has well-developed suburban areas in the southern part of the County and a large agricultural area in the north. We are a member of the Roanoke Valley Broadband Authority and have worked aggressively on both private and public options for residential and business internet. Next week we are holding a County Broadband Summit with over 100 participants, including private and public carriers all over the region. Nevertheless, deployment has been slow.

Botetourt County is traversed by national forests and the Appalachian Trail along ridgelines and in wilderness areas. The County is a significant landowner of tracts in fee simple. It also owns the land underlying many roads. Under Virginia law as it has stood since 1948, the land underlying primary roads is owned by the Commonwealth; the land

underlying subdivision streets is owned by the County. However, most country roads in the County are prescriptive easements that came into existence through long use, rather than as part of any dedication. The abutting landowners own the underlying land. All of these roads are managed and maintained by the Virginia Department of Transportation (VDOT), but the County and private persons retain important residual rights as owners of underlying land.

Our goal is expansion of broadband to all of our citizens. As the owners of substantial property, we stand ready to partner with anyone who brings the technical expertise to bring internet to our unserved and underserved areas, as we have for years. Nevertheless, we have a duty to steward that property wisely and to protect the public safety, health, and welfare of our citizens. We are concerned that the proposed language would significantly impede our ability to manage our property and to regulate in the public interest. To this end, we offer the following comments:

- **The FCC's proposed new collocation shot clock category is too extreme.** The proposal designates any preexisting structure, regardless of its design or suitability for attaching wireless equipment, as eligible for this new expedited 60-day shot clock. When paired with the FCC's previous decision exempting small wireless facilities from federal historic and environmental review, this places an unreasonable burden on local governments to prevent historic preservation, environmental, or safety harms. The addition of up to three cubic feet of antenna and 28 cubic feet of additional equipment to a structure not originally designed to carry that equipment is substantial and may necessitate more review than the FCC has allowed in its proposal. Any similar structural change in any other context would be subject to review as a site plan and/or under the Uniform Statewide Building Code (USBC). Virginia law provides that an application for small cell facilities must be processed in 60 days, and may be extended to 90 at the discretion of the zoning administrator, and that the locality need accept no more than 35 sites in a single application.[1] We have assimilated this requirement into the similar procedures for processing of site plans.[2] We believe these timelines to be very difficult to meet, but the costs and difficulty can likely be managed by our three-person zoning and site plan processing department. Any more than that would strain our resources past the breaking point. We therefore ask that the Commission not place more severe constraints on us than we presently have.

- **The FCC's proposed definition of "effective prohibition" is overly broad.** The draft report and order proposes a definition of "effective prohibition" that invites challenges to long-standing understandings of the law and is bad policy. The phrase "materially limits or inhibits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment" is so vague as to provide no practical guidance, and practically begs for litigation. Other private businesses routinely deal with reasonable constraints on their land uses, including zoning, site plan, and Building Code processes as part of the police power of the Commonwealth.[3] These concerns include safety and aesthetics. The proposed order leaves localities in the quandary of trying to guess whether a uniform police power public health, safety, or appearance rule might appear to a person to disadvantage

[1] Va. Code § 15.2-2316.4(B).
[2] *See* Va. Code § 15.2-2259.
[3] *West Bros. Brick Co. v. City of Alexandria*, 169 Va. 271, 282, 192 S.E. 881, 885 (1937).

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them in the marketplace. Given the many technologies involved—small cells, fiber optics, macro-cell, and even old copper in places—and their very different impacts on the public, making a "competitive market" the touchstone of regulation rather than public health, safety, and general welfare is unreasonable and impracticable.

- **The FCC's proposed recurring fee structure for regulatory costs is an unreasonable overreach that will harm local policy innovation.** We disagree with the FCC's interpretation of recurring management fees as meaning approximately $270 per small cell site. VDOT has demonstrated that it is capable of setting reasonable fees based on its actual costs as a state agency.

- **Expropriation of property to private interests requires just compensation.** Property rights under the Fifth Amendment are defined by state, not federal, law.[4] The U.S. Supreme Court has remarked in the context of cable facilities that "where government requires an owner to suffer a permanent physical invasion of her property—however minor—it must provide just compensation."[5] Of course, Virginia localities may not divert public property to a private interest, such a Title I communications company; indeed, permanent occupancy of the right-of-way by such an entity is a nuisance per se under Virginia law.[6] Virginia local rights-of-way are valuable property rights whose taking under federal governmental authority must be compensated,[7] and localities have the same rights as private persons in other property that is not dedicated to public passage.[8] Abutting landowners also have significant rights in roads that were laid out before the Land Subdivision Act was adopted in 1948.[9] Because the County is accountable for good stewardship of public property, it might take action to protect both its its and its citizens' property rights.

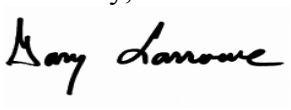
- **If public property is to be appropriated to private use, providers should be required to expand into unserved and underserved areas as part of the bargain.** This is the fundamental bargain that all private corporations who seek to use public property have with the public: They receive special rights to use the right-of-way and other public property, but in return they have obligations to expand their services to provide quality service to all those requesting it at fair, reasonable, and uniform prices. This is all we ask—and what we have worked diligently to assist providers in doing. Expanded rights in public property for private providers should be directly tied to duties to serve the public. To do less is simply to take and expropriate public and private property for another's private benefit.

We believe that partnership between those with technical expertise and those with property to deploy it is preferable to the antagonistic relationship the Order sets up. Botetourt County has been open to and proactively sought partnerships with all comers who bring technical expertise, and has diligently worked with private business to build the best broadband infrastructure possible for our residents. We will continue to do so. But we must oppose this effort to restrict local authority to regulate in areas of traditional

[4] *Stop the Beach Replenishment v. Fla. Dep't of Evntl. Prot.*, 560 U.S. 702, 707 (2010).
[5] *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 538 (2005) (citing *Loretto v. Teleprompter Manhattan VATV Corp.*, 458 U.S. 419 (1982)).
[6] *City of Lynchburg v. Peters*, 145 Va. 1, 9, 133 S.E. 674, 677 (1926); Va. Code § 15.2-2018.
[7] *Bd. of Cnty. Supv'rs of Prince William Cnty. v. United States*, 48 F.3d 520 (Fed. Cir. 1995).
[8] Va. Code § 15.2-1800.
[9] *See* Op. Va. Att'y Gen. 07-047 (Aug. 7, 2007).

state and local concern such as public health, safety, and aesthetics, stymie local innovation and partnerships to expand availability of service, and expropriate property without attendant obligations to serve the public welfare. We urge you to oppose this declaratory ruling and report and order.

Sincerely,



Gary Larrowe
County Administrator
Botetourt County, Virginia

Cc: Mr. Jack Leffel
Dr. Mac Scothorn
Mr. Mike Lockaby
Ms. Nicole Pendleton

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